

TRADE TRANSPARENCY: A CALL FOR SURFACING
UNSEEN DEALS

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For many years, the executive branch has concluded foreign commercial agreements with trading partners pursuant to delegated authority from Congress. The deals govern the contours of a wide range of U.S. inbound and outbound trade: from food safety rules for imported products to procedures and specifications of exported goods, to name two. The problem is that often no one—apart from the executive branch negotiators—knows what these deals contain. A lack of transparency rules has inhibited the publication of and reporting to Congress of these unseen deals. Dozens if not hundreds of foreign commercial deals are unseen in two ways: (1) The executive branch rarely makes their texts readily available, and (2) the texts of many such deals appear largely to have been lost by the executive branch itself. This Piece lays out how the Biden Administration and Congress could ameliorate such problems in the trade transparency and recordkeeping systems. It identifies the flaws in our separation of trade law powers that have led to the hiddenness of such deals, drawing from interviews with U.S. officials that help to shed light on the deals’ obscurity. Expecting that the Biden Administration is likely to rely on these deals despite these acute problems, this Piece suggests changes to the system without hampering the executive’s use of this increasingly important tool.

INTRODUCTION

In 2020, the United States entered into at least thirty-two different commercial agreements with U.S. trading partners governing myriad topics, from automobiles to special commercial zones.¹ Take, for example, the

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1. For a partial list, see Off. of the U.S. Trade Representative, 2021 Trade Policy Agenda and 2020 Annual Report of the President of the United States on the Trade Agreements Program 1–34 (2021), <https://ustr.gov/sites/default/files/files/reports/2021/2021%20Trade%20Agenda/Online%20PDF%202021%20Trade%20Policy%20Agenda>

agreement between Mexico and the United States that allows U.S. companies to import grain-oriented electrical steel from Mexico under certain conditions.² Another such agreement commits the United States to beginning a regulatory process concerning the intellectual property protection of a Bolivian brandy.³ Others of these thirty-two agreements change tariff rates or some make new rules, while still others acknowledge foreign commitments for U.S. products. Given President Joe Biden's statements that big congressional-executive trade agreements are low on his priority list,⁴ these executive-only deals are very likely to remain in place as the primary trade policymaking tool for the Biden Administration.

Puzzlingly, neither of the two agreements given as examples is available to the public—nor are a significant number of negotiated agreements.⁵ Few trade agreements have been made available to Congress either, despite Congress's constitutional primacy on such matters.⁶ In fact, there are scarce requirements for the publication of or reporting to Congress of our foreign commercial agreements; those that may apply are contested by the agencies to which they are directed.⁷ The absence of a clear regime has also led to recordkeeping difficulties.⁸ The result is that frequently neither Congress nor the public, and sometimes not even the bureaucrats in the executive branch, know what these deals contain.

This absence of transparency and of organizational obligations contrasts with the State Department-led system for other types of executive agreements.⁹ And yet, the need for public transparency and awareness is likely greater in the case of trade agreements given their business and regulatory impacts. Trade deals operate in valuable economic spaces, and they

<https://perma.cc/E9VSE3SB>] [hereinafter Annual Report].

2. See Press Release, Off. of the U.S. Trade Representative, USTR Statement on Successful Conclusion of Steel Negotiations With Mexico (Nov. 5, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/november/ustr-statement-successful-conclusion-steel-negotiations-mexico> [<https://perma.cc/P7LP-S8RJ>].

3. See Press Release, Off. of the U.S. Trade Representative, Deputy U.S. Trade Representative C.J. Mahoney and Bolivian Foreign Minister Karen Longaric Exchange Letters on Unique Distilled Spirits (Jan. 24, 2020), <https://ustr.gov/index.php/about-us/policy-offices/press-office/press-releases/2020/january/deputy-us-trade-representative-cj-mahoney-and-bolivian-foreign-minister-karen-longaric-exchange> [<https://perma.cc/4Z8D-778N>] [hereinafter Off. of the U.S. Trade Rep., Letters on Unique Distilled Spirits].

4. Joe Biden, Responses to United Steelworkers' Federal Candidate Questionnaire, USW Voices (May 17, 2020), <https://www.uswvoices.org/endorsed-candidates/biden/BidenUSWQuestionnaire.pdf> [<https://perma.cc/LE8A-875P>] [hereinafter Steelworkers' Federal Candidate Questionnaire].

5. See *infra* note 36 and accompanying text.

6. See *infra* Part I.

7. See *infra* Part I.

8. See *infra* Part I.

9. See 1 U.S.C. § 112b (2018) (directing the Secretary of State to transmit international agreements to Congress).

do so entirely under delegated authority. For these reasons, their transparency both to the public and to Congress is especially important.

This Piece lays out how the Biden Administration and Congress could ameliorate these problems in the trade transparency apparatus while still relying on executive trade deals to achieve U.S. foreign economic goals. Dozens if not hundreds of trade executive agreements (TEAs) are unseen in two ways: (1) The executive branch rarely makes their texts readily available to Congress or to the public despite acknowledging or sometimes even heralding their negotiation, and (2) the texts of some of these TEAs appear largely to have been lost by the executive branch itself. Part I analyzes how a form of trade exceptionalism in the executive agreement-making process has contributed to the invisibility of TEAs. Part II turns to the recordkeeping struggles that have helped to hide TEAs, relying in part on interviews with U.S. officials that have shed light on their obscurity. Part III argues that these dual flaws are more problematic for commercial agreements than for other executive agreements considering the practical effects and constitutional positioning of TEAs. Part IV recommends reforms for Congress and the new Administration to change the way unseen trade deals are reported and published without hampering the executive's use of this increasingly important tool.

I. THE NONTRANSPARENCY REGIME

The Constitution sets out that regulation of foreign commerce is a congressional prerogative,¹⁰ although Congress has largely delegated that responsibility to the executive.¹¹ The key agency in making trade deals of all types is the Office of the U.S. Trade Representative (USTR). USTR is the lead negotiator for both major free trade agreements (FTAs), like the recent United States–Mexico–Canada Agreement, as well as most other trade-related policy negotiations. It is “responsible to the President and the Congress for the administration of[] trade agreements programs.”¹² Over the last forty years, Congress has maintained significant control over the FTA negotiations into which the USTR and the President have entered. In those contexts, the executive not only has to report regularly to Congress and follow congressional objectives but also has to submit the final agreement for Congress to approve in both houses.¹³ Those reporting requirements have grown more stringent since they were first impleme-

10. See U.S. Const. art. I, § 8, cl. 3.

11. See Douglas A. Irwin, *Clashing Over Commerce: A History of US Trade Policy* 8, 432, 452 (2019) (discussing the political history of trade in the United States).

12. 19 U.S.C. § 2171(c)(1)(F) (2018); see also U.S. Int'l Trade Comm'n, Publ'n No. 4986, *The Year in Trade 2018: Operation of the Trade Agreements Program*, 70th Report 1, 31 (2019), <https://www.usitc.gov/publications/332/pub4986.pdf> [<https://perma.cc/4XN9-6SV4>] (defining the trade agreements program and its statutory authorities).

13. See, e.g., 19 U.S.C. § 4202 (setting out trade agreements authority).

nted in 1974.¹⁴ But while Congress was tightening disciplines for public engagement as well as for its own input and monitoring of big FTAs, it was paying little attention to agreements made by the executive alone: TEAs.

In fact, increased pressures in the FTA process, among other congressional demands, may have prompted executive branch officials to deploy TEAs more often to achieve trade policy goals. As one former U.S. Trade Representative hinted, USTR officials choose TEAs over FTAs to avoid triggering statutory obligations that require them to go through Congress.¹⁵ TEAs are not perfect substitutes for FTAs—for example, they do not make reciprocal commitments to reduce tariff rates on substantially all trade between two or more countries.¹⁶ But they have been used to circumvent congressional restraints to achieve some of the same outcomes, especially when it comes to regulatory harmonization and the development of market access.¹⁷ Plus, the institutional design for trade lawmaking with USTR as the lead, instead of the State Department as for many other agreements, created a ripe environment in favor of using TEAs: As TEAs were removed from the “ordinary” international and trade lawmaking regimes, they fell further off the congressional, scholarly, and public radars and became the path of least resistance to accomplishing trade business.¹⁸

But neither the popularity of these agreements among trade lawmakers nor their special procedural arrangements fully explains why or how the general transparency regime for executive agreements often excludes them. According to the 1972 Case–Zablocki Reporting Act (Case Act), the Secretary of State is required to publish all “international agreements” into which the United States has entered each calendar year and to transmit those to Congress.¹⁹ In accordance with the regulations implementing that statute, agencies must send their concluded agreements to

14. See Kathleen Claussen, Separation of Trade Law Powers, 43 *Yale J. Int'l L.* 315, 318, 336 (2018) (“Notwithstanding the passage of time since that low period in the trust of the Executive, the number and forms of congressional requirements for executive engagement have only increased.”).

15. See Anshu Siripurapu, Portman: Appellate Body Nominations Block Needed to Achieve WTO Reform, *Inside U.S. Trade* (Nov. 8, 2019), <https://insidetrade.com/daily-news/portman-appellate-body-nominations-block-needed-achieve-wto-reform> (on file with the *Columbia Law Review*) (quoting Senator Rob Portman attributing the Trump Administration’s choice to go around Congress to conclude a deal with Japan to the difficulty in using the fast-track process).

16. See Kathleen Claussen, Trade’s Mini-Deals, 62 *Va. J. Int'l L.* (forthcoming 2022) (manuscript at 13–14), https://papers.ssrn.com/abstract_id=3836909 [<https://perma.cc/JDS4-E2FU>] [hereinafter Claussen, Mini-Deals] (explaining what trade executive agreements do).

17. *Id.*

18. *Id.*

19. See 1 U.S.C. §§ 112a–112b (2018). The Secretary may exclude certain agreements where the public interest is insufficient to justify their publication—either because they “do not create private rights or duties, or establish standards intended to govern government action in the treatment of private individuals” or because “in view of the limited or specia-

the State Department for the State Department to transmit those agreements to Congress.²⁰ When it comes to trade agreements, however, USTR is, in practice, often the first and last stop. USTR plays what would, in other foreign relations circumstances, be the State Department's "clearinghouse role"²¹—and this immediately creates distinctions in how those agreements are handled. Just as TEA-making is removed from the State Department's oversight in the mechanics of dealmaking,²² it is also left out of the State Department's reporting and publishing repertoire.

TEAs have not been regularly transmitted to the State Department in accordance with State's Case Act regulations for at least three reasons. First is a statutory interpretation debate between the agencies about the precise contours of what the Case Act covers. The State Department and other agencies sometimes disagree about what the statute requires agencies to provide to the State Department.²³ Some statutes require the President to separately report trade-related agreements to Congress, for example.²⁴ Second is some degree of trade exceptionalism that is rooted in U.S. trade law's unique institutional history and engagement with Congress.²⁵ USTR in particular justifies an exceptional position for reporting purposes based on its close relationship with congressional committees.²⁶ Third, State

lized nature of the public interest in such agreements, such interest can adequately be satisfied by an alternative means" (among other criteria)—although copies must be made available upon request. *Id.* § 112a(b)(2)(B)–(C).

20. 22 C.F.R. § 181.5 (2020) (instructing agencies to share their concluded agreements with the State Department within twenty days).

21. See Harold Hongju Koh, Address: Twenty-First-Century International Lawmaking, 101 *Geo. L.J. Online* 1, 9 (2012). Harold Koh discusses how the "clearinghouse role" involves rigorous legal and policy review on foreign policy activities and negotiations across the executive branch. *Id.*

22. Claussen, *Mini-Deals*, *supra* note 16, at 17–19 (describing how the trade dealmaking process is separate from the making of other agreements).

23. See Interview with Former USTR Official A, in Washington, D.C. (Aug. 19, 2019) (explaining that USTR has experienced problems in working together with the State Department); see also Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 *Harv. L. Rev.* 629, 673 n.204 (2020) (explaining that USTR and State Department officials disagree about whether certain trade agreements may bypass reporting requirements).

24. See, e.g., 19 U.S.C. § 4202(a)(2) (2018) (requiring the President to notify Congress of trade agreements).

25. See Kathleen Claussen, *Our Trade Law System*, 73 *Vand. L. Rev. En Banc* 195, 198–203 (2020) (setting out the ways in which trade is exceptional and has unique institutional positioning).

26. In recent years, two USTR policy staff have been responsible for transmitting agreements to the State Department. The lead attorney prepares an electronic copy of the agreement and a paper copy in a formal plastic portfolio, typically printed on special, longer paper for ceremonial signing. They also prepare a cover page that summarizes the agreement, discusses whether there is a need for implementing any legislation, and identifies the source of legal authority for the agreement. Those materials are then passed to the policy staff for transmission to the State Department. USTR staff sometimes treat the deadlines for this process as "advisory" and as a result do not transmit the materials to the State Department in a timely fashion, if at all. See Interview with Former USTR Official A, *supra* note 23.

Department regulations exclude from reporting (and from publishing) some TEAs based on an internal determination that they are “non-binding,” or fall in other specialized categories.²⁷ In other words, even when the State Department receives TEAs from USTR and other agencies, the State Department’s regulations exempt certain trade agreements from publication.²⁸

Few other statutes require USTR to report to Congress about TEAs—whether before, during, or after their entry into force. Thus, for many years, Congress has directly and indirectly authorized the President to enter into foreign commercial agreements with no guidelines on keeping the legislature informed. There is no organized structure for reporting and engaging with Congress apart from the rare, individualized reporting requirement for a particular type of TEA.²⁹ To be sure, Congress regularly asks for reports about trade lawmaking activities, including what has been known as the U.S. “trade agreements program,” but this typically amounts to either reporting just about FTAs or a list of TEAs that is rarely scrutinized by the Hill or other stakeholders.³⁰

The institutional fault lines between USTR and the State Department have developed into a chasm that engulfs TEAs more than other executive agreements, even though one of the original purposes of the institutional

27. See 1 U.S.C. §§ 112a–112b (2018); 22 C.F.R. § 181.2(a) (2020) (defining the categories of agreements that are transmitted to Congress). This arrangement incentivizes the State Department to interpret “non-binding” broadly, since the distinction between binding and nonbinding determines publication and reporting requirements. The State Department is inconsistent in this practice, however. It has published certain semi-non-binding trade agreements but not others, despite the fact that those agreements were identical in operative content. For example, the State Department makes available the Argentina–U.S. Trade and Investment Framework Agreement but not the Angola–U.S. Trade and Investment Framework Agreement. The latter does not appear in the State Department’s *Treaties in Force* publication and was not given a “Treaties and Other International Act Series” designation. Compare Trade and Investment Framework Agreement Between the Government of the United States of America and the Government of the Argentine Republic, Arg.-U.S., Mar. 23, 2016, T.I.A.S. No. 16-323.1 (establishing the United States-Argentina Council on Trade and Investment), with Trade and Investment Framework Agreement Between the Government of the United States of America and the Government of the Republic of Angola, Angl.-U.S., May 19, 2009, <https://ustr.gov/sites/default/files/US-Angola%20TIFA%20English.pdf> [<https://perma.cc/UU2G-25NV>] (establishing the United States-Angola Council on Trade and Investment). Although, USTR has published both documents together. See Trade & Investment Framework Agreements, Off. of the U.S. Trade Representative, <https://ustr.gov/trade-agreements/trade-investment-framework-agreements> [<https://perma.cc/7Y8W-NHQ9>] (last visited Oct. 29, 2021).

28. See 22 C.F.R. § 181.8(a)(2), 181.8(a)(8) (exempting from the publication rule textiles agreements and tariff schedules).

29. See, e.g., 19 U.S.C. § 4202(a)(2) (requiring the President to notify Congress of the President’s intent to enter into a TEA that modifies duties).

30. See *id.* (setting out the requirements for the President regarding reporting on the trade agreements program); Off. of the U.S. Trade Representative, *supra* note 1, at Annex II (setting out the agreements that the U.S. Trade Representative is monitoring); U.S. Int’l Trade Comm’n, *supra* note 12 (providing a report on the trade agreements program).

separation of trade was to *improve* the trade agreement-making process.³¹ By excepting trade in institution, statute, and regulation, TEAs often remain off the grid.

II. DISAPPEARING DEALS

Unfortunately, the TEA system has failed as a reporting and publishing regime, and as a recordkeeping regime. Each year, USTR reportedly monitors several hundred TEAs for U.S. trading partners' compliance; in fact, USTR appears to be flying blind with regard to twenty percent of those agreements. As this Part shows, in many instances, the government has not only failed to make a TEA publicly available or to report it to Congress but also has lost the agreement altogether.

Government agencies lack a comprehensive count or collection of trade-related agreements, despite the attention Congress and government watchdogs have afforded this problematic state of play.³² A 1999 Government Accountability Office report concluded that the Department of Commerce, the State Department, and USTR were not tracking trade agreements appropriately or effectively. There is no evidence that the agencies implemented the changes that the report recommended.³³ The agencies' websites remain incomplete, as do their hard-copy collections: Of the more than 500 TEAs listed in the USTR Annual Report, only about forty percent are publicly available on the USTR site.³⁴ Others can be located through subscription services or, occasionally, through the State Department treaty databases.³⁵ Still others are not made public at all.³⁶

31. See 119 Cong. Rec. 40,509 (1973) (“[T]he position was created to provide both better focus and centralized direction for treating trade negotiations and trade problems from an overall commercial point of view—and to downplay the strictly foreign policy orientation . . . of the Department of State.”); Thomas R. Graham, *The Reorganization of Trade Policymaking: Prospects and Problems*, 13 *Cornell Int'l L.J.* 221, 224–25 (1980) (explaining that “the positions that each department strives to promote in trade negotiations frequently conflict”).

32. See, e.g., U.S. Gen. Acct. Off., GAO/NSIAD-00-76, *International Trade: Strategy Needed to Better Monitor and Enforce Trade Agreements* 13 n.10 (2000) (“The actual number of trade agreements currently in force is unknown, although we found over 400 agreements that entered into force since 1984.”); U.S. Gen. Acct. Off., GAO/NSIAD-00-24, *International Trade: Improvements Needed to Track and Archive Trade Agreements* 4 (1999) [hereinafter GAO Report 1999] (noting that “[t]he number of trade agreements to which the United States is currently a party is uncertain” and that “key agencies were unable to provide a definitive count of all U.S. trade agreements that are currently in force”).

33. See GAO Report 1999, *supra* note 32, at 5 (noting that the GAO was making recommendations); see also U.S. Gov't Accountability Off., GAO-17-399, *Trade Enforcement: Information on U.S. Agencies' Monitoring and Enforcement Resources for International Trade Agreements* 10 (2017) (commenting that the GAO did not independently confirm whether agencies were acting consistently with their monitoring commitments).

34. Notably, the Annex failed to account for 225 additional TEAs found on the USTR website. See Claussen, *Mini-Deals*, *supra* note 16, app. at 63.

35. See *id.* at 7.

36. See *id.*

Some that are more than five years old have been lost by the U.S. government, according to government staff.³⁷ In short, despite annual reports on the subject from both USTR and the International Trade Commission, no government agency has a comprehensive collection.³⁸

The specific reasons for the disappearances of TEAs vary. In speaking with government officials who have worked on negotiating and monitoring these agreements, several disconcerting causes and confusions came to light. TEAs are occasionally misplaced in institutional turnover, for example.³⁹ One official noted that in a technology migration several years ago, information technology professionals lost documents, even though policymakers had requested they be kept.⁴⁰ Another commented that certain agreements “probably were never public”⁴¹ due to institutional capacity constraints. One former official commented that her usual routine while at USTR was to travel almost weekly, and it was impossible to ensure that agreements negotiated one week would be forwarded through the proper channels before taking off again: It was hard enough to “switch out one binder for the other” and get back on the road.⁴² Another former official shared that there is extensive “lore” on oral deals that were also concluded by U.S. bureaucrats. He recalled one instance where an abbreviated summary of a deal was jotted down in the margins of a map purchased at the gift shop of the negotiating venue; no other record of the agreement exists.⁴³ Still other officials have surmised that

37. See E-mail from USTR Official 1 to author (Apr. 28, 2020) (on file with the *Columbia Law Review*) [hereinafter E-mail from USTR Official 1] (explaining that documents were lost after an update to the document retrieval system); E-mail from USTR Official 2 to author (May 4, 2020) (on file with the *Columbia Law Review*) (explaining the lack of access to particular agreements).

38. To be sure, USTR has a robust records management plan consistent with the Federal Records Act, 44 U.S.C. § 3101 (2018). See Fred L. Ames, Off. of the U.S. Trade Representative, USTR Instruction 511.2, USTR Records Management Program (2010), <https://ustr.gov/sites/default/files/uploads/gsp/speeches/reports/IP/ACTA/about%20us/reading%20room/USTR%20Instruction%20511-2%20Records%20Management%20Program.pdf> [<https://perma.cc/A36R-JLAG>] (outlining staff duties for records safeguarding as required by federal law). But that plan has failed to capture these trade agreements.

39. See Interview with Former USTR Official A, *supra* note 23 (explaining that no central filing system exists).

40. See E-mail from USTR Official 1, *supra* note 37.

41. See E-mail from USTR Official 4 to Isabelle Janssen, Rsch. Assistant & Student, Univ. of Mia. Sch. of L. (June 15, 2020) (on file with the *Columbia Law Review*).

42. See E-mail from Former USTR Official C to author (Oct. 26, 2020) (on file with the *Columbia Law Review*).

43. E-mail from Former USTR Official B to author (Feb. 1, 2021) (on file with the *Columbia Law Review*).

certain agreements may be available in paper archives, offsite and inaccessible to current staff.⁴⁴ Another has suggested that their obscurity might be purposeful.⁴⁵

The failed recordkeeping regime for TEAs would be less significant if these deals were not meaningful or were limited to just one administration, for example. The sparse discussion of their whereabouts or content could be reflective of their highly limited substance. But their past suggests they are widely used across many years with considerable regulatory impact and that their future is likely to be fulsome.⁴⁶

III. BLIND SPOTS

Trade practitioners and some academics have lamented the limited transparency surrounding major congressional–executive FTAs.⁴⁷ Yet most of those complaints in the FTA-making process relate to negotiating drafts and differentiated access to the agencies making decisions on agreement text. In the case of TEAs, as seen above, the transparency challenges extend even further and pose their own difficulties. Trade agencies are not the only federal agencies making less formal deals,⁴⁸ but they should not be able to have it both ways: both to engage in off-the-books dealmaking and to rely on those deals as enforceable trade rules. Doing so places the burden on the public to parse what is legally binding or significant rather than clearly staking out what is a mere political commitment. This Part outlines four major problems with the present arrangement and the invisibility of TEAs.

First, as a matter of good governance and diplomacy, texts of trade agreements ought to be made available. No statutory authority—apart from that which is contested under the Case Act—requires the ordinary

44. E-mail from USTR Official 5 to author (July 14, 2020) (on file with the *Columbia Law Review*). According to one bureaucrat, there may be more available in the USTR building, but the pandemic has prevented anyone from checking if this is true. E-mail from USTR Official 6 to author (Apr. 21, 2020) (on file with the *Columbia Law Review*).

45. See Warren H. Maruyama, *The Wonderful World of VRAs: Free Trade and the Goblet of Fire*, 24 *Ariz. J. Int'l & Comp. L.* 149, 160 (2007) (commenting that certain types of TEAs, such as the Voluntary Restraint Agreement or VRA, “could avoid some of the domestic and international opprobrium attached to [their content] through their obscurity”).

46. See, e.g., Kathleen Claussen, *Regulating Foreign Commerce Through Multiple Pathways: A Case Study*, 130 *Yale L.J. Forum* 266, 278–80 (2020) (discussing the considerable impact of current trade agreements “on the administrative state” and how future trade agreements will likely do the same).

47. See, e.g., Maria Laura Marceddu, *Implementing Transparency and Public Participation in FTA Negotiations: Are the Times A-Changin’?*, 21 *J. Int'l Econ. L.* 681, 682–83 (2018) (describing how civil society groups have challenged transparency deficiencies in major trade agreement negotiations).

48. See Daniel Bodansky & Peter Spiro, *Executive Agreements+*, 49 *Vand. J. Transnat'l L.* 885, 891–93 (2016) (“The United States increasingly engages international regimes through less formal, lower profile mechanisms, which raise transparency as well as accountability concerns.”).

publication of a TEA before or after concluding it, despite that many TEAs have the effect and force of domestic regulations.⁴⁹ Surprisingly, USTR and other agencies will sometimes note the conclusion of a TEA but not share the text, even with those who may be affected directly or indirectly by its rulemaking.⁵⁰ Unsurprisingly, however, few TEAs have been subject to challenge given that there is no clear path to judicial review nor a formally institutionalized review process; therefore, there is no pressure on agencies to make agreements public after they enter into force. Even agreements lost within the U.S. government may remain legally and operationally significant by means of incorporation into agency practices.⁵¹ This situation becomes more problematic if the agencies wish to change course without awareness that their prior course was the implementation of a now-lost TEA.

Second, TEAs create binding commitments of value to at least some market actors. TEAs can serve as problem-solving tools that create market access for U.S. actors, impose rules for foreign actors, and more.⁵² That

49. Claussen, *Mini-Deals*, supra note 16, at 13–14 (noting how TEAs can act as regulations).

50. See, e.g., Off. of the U.S. Trade Representative, *Letters on Unique Distilled Spirits*, supra note 4; *UAE Agrees to Section 232 Quota Deal on Aluminum Imports*, Inside U.S. Trade (Jan. 20, 2021), <https://insidetrade.com/trade/uae-agrees-section-232-quota-deal-aluminum-imports> (on file with the *Columbia Law Review*); Press Release, Off. of the U.S. Trade Representative, *United States and Brazil Update Agreement on Trade and Economic Cooperation With New Protocol on Trade Rules and Transparency* (Oct. 19, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/october/united-states-and-brazil-update-agreement-trade-and-economic-cooperation-new-protocol-trade-rules> (on file with the *Columbia Law Review*).

51. Some staff have acknowledged their operationalization while remaining uncertain as to whether they can make available the texts of the agreements themselves to members of the public. See, e.g., E-mail from USTR Official 3 to Isabelle Janssen, Rsch. Assistant & Student, Univ. of Mia. Sch. of L. (July 1, 2020) (on file with the *Columbia Law Review*) (noting that the documents requested were not able to be shared since they were not automatically public).

52. See, e.g., Exchange of Letters Between Robert E. Lighthizer, Ambassador, U.S. Trade Rep., and Chrystia Freeland, Minister of Foreign Affs., Canada (Nov. 30, 2018) (discussing Canada’s provision of access to pipeline networks, including promising that a Pacific Northwest power service provider will offer “treatment no less favorable than the most favorable treatment afforded to utilities located outside the Pacific Northwest”); Exchange of Letters Between Michael B. G. Froman, Ambassador, U.S. Trade Rep., and Vu Huy Hoang, Minister of Indus. & Trade, Socialist Republic of Vietnam (Feb. 4, 2016) (setting out service requirements for cross-border electronic payments); Agreement Between the United States of America and Chile, Exchange of Letters from Bruce I. Knight, Under Sec’y, USDA & Dr. James M. Murphy Jr., Assistant U.S. Trade Rep. for Agric. Affs., Off. of the U.S. Trade Representative, to Mariano Fernandez, Ambassador, Republic of Chile, Chile-U.S., Nov. 21, 2008, T.I.A.S. No. 08-1121 (limiting the application of USDA standards on grapes to a specified time of year for a period of five years); Agreement on the Safety of Drugs and Medical Devices, U.S.-China, Dec. 11, 2007, T.I.A.S. No. 07-1211; Agreement Between the Government of the United States of America and the European Community on the Coordination of Energy-Efficiency Labelling Programs for Office Equipment, U.S.-Eur., Dec. 28, 2006, Hein’s No. KAV 8323.

makes the hiddenness of TEAs additionally troublesome—far beyond that of other executive agreements. Their application, monitoring, and engagement needs are more acute than those with respect to agreements that create only administrative commitments for the U.S. government. Business actors depend on them and use them regularly. Compare those needs to other agreements monitored by the State Department that do not involve “citizen users,” for example.⁵³

Third, making TEAs public or at least available to Congress is also a matter of constitutional accountability. Given that the executive’s authority with respect to foreign commerce is all delegated, Congress has a special interest in monitoring the outcomes of the deployment of such authority. Nothing about the legal distribution of authority in this space suggests that, because these agreements are sometimes small or informal or involve typical executive functions, they need not be vetted or overseen by Congress. In fact, there is considerable “process” writ large in the relation-

ship between Congress and the executive on trade, including extensive consultation requirements.⁵⁴ Congress views itself as USTR’s client.⁵⁵ The statutory framework is silent as to any special arrangement governing the relationship between and among the trade-engaged agencies—more than one of which may be involved in a single TEA—and the State Department on reporting TEAs. In this sense, TEAs are an aberration in their seemingly casual invisibility, and their informality has led to opaqueness.⁵⁶ The current structure lacks any oversight backstop and any opportunity to review projected content. Especially in light of the absence of judicial review—even if courts would be poor intermediaries in the context of interbranch disagreement here—transparency is one means by which to check whether the executive exceeded delegated authority.

Fourth, there are undoubtedly more TEAs to come. Prior to his inauguration, President Biden indicated his aversion to large-scale trade agreements,⁵⁷ which means smaller “skinny” or “mini” deals are likely to be favored. Members of Congress and commentators have suggested the

53. See, e.g., Memorandum of Understanding Between the United States of America and Colombia, Colom.-U.S., July 24, 1990, T.I.A.S. No. 12417 (governing the relationship between the United States and Colombia with regard to the latter’s cooperation and assistance in investigations and proceedings pertaining to the seizure or forfeiture of property in narcotics trafficking and related criminal activity).

54. See, e.g., Off. of the U.S. Trade Representative, Guidelines for Consultation and Engagement 1 (2015), <https://ustr.gov/sites/default/files/USTR%20Guidelines%20for%20Consultation%20and%20Engagement.pdf> [<https://perma.cc/B9QT-HUVZ>] (setting out the guidelines for consultation between USTR and members of Congress).

55. See Hearing on U.S. Trade Policy Agenda Before the H. Comm. on Ways & Means, 115th Cong. 21 (2018) (statement of Rep. Kevin Brady, Chairman, H. Comm. on Ways & Means).

56. See Daniel C. Esty, Good Governance at the Supranational Scale: Globalizing Administrative Law, 115 Yale L.J. 1490, 1538 (2006) (discussing the danger of TEAs).

57. See Steelworkers’ Federal Candidate Questionnaire, *supra* note 4.

same.⁵⁸ If FTAs are moved to the back burner, the Biden Administration will continue to advance U.S. interests through TEAs.⁵⁹

While there are surely still other reasons for addressing the invisibility of TEAs, such as the ethical dimensions at play, these four alone make clear the need for reform. The time for that reform is now, and the next Part turns to the options.

IV. REFORMED REPORTING

If the Biden Administration is committed to the “highest standards of transparency” in foreign policy,⁶⁰ TEAs are a reasonable place to start. Two issues arise: making TEAs publicly available and engaging with Congress about them. Both are important, but they may require different solutions. With respect to the former, there is some low-hanging fruit. For one, a simple way to address at least those agreements that the government is able to locate is to upload them to the USTR website and add links to the USTR Annual Report that take the reader to each document. Such a system would at least make available those agreements that USTR has on file and presumably others that it can get from partner agencies. USTR could centralize these with a simple database, putting all trade-related agreements in one place, true to its statutory authority as the clearinghouse for U.S. trade policymaking and the lead on the “trade agreements program”—a program that has evolved considerably over time to the point of today’s lack of clarity on its contours. Doing so with congressional endorsement would also help clarify agency roles and avoid interagency disputes over agreements.

This suggestion is similar to the one made about executive agreements generally by Oona Hathaway, Curt Bradley, and Jack Goldsmith in a recent article,⁶¹ but it is worth setting trade agreements apart. Those scholars have rightly noted the ways in which the general organizational system

58. See, e.g., Lawmakers, Analysts Eye New TPA as an Opportunity for Change, *Inside U.S. Trade* (Mar. 11, 2021), <https://insidetrade.com/daily-news/lawmakers-analysts-eye-new-tpa-opportunity-change> (on file with the *Columbia Law Review*) (noting that some members of Congress support smaller deals).

59. The Biden Administration has already announced some interest in deals, and members of Congress have supported still more. See, e.g., Tai, Brazilian Minister Discuss Updated Trade Deal Signed Last Year, *Inside U.S. Trade* (May 18, 2021), <https://insidetrade.com/trade/tai-brazilian-minister-discuss-updated-trade-deal-signed-last-year> (on file with the *Columbia Law Review*); Peter Martin, Eric Martin & Saleha Mohsin, Biden Team Weighs Digital Trade Deal to Counter China in Asia, *Bloomberg* (July 12, 2021), <https://www.bloomberg.com/news/articles/2021-07-12/biden-team-weighs-digital-trade-deal-to-counter-china-in-asia> (on file with the *Columbia Law Review*) (last updated July 13, 2021).

60. Memorandum on Revitalizing America’s Foreign Policy and National Security Workforce, Institutions, and Partnerships, 2021 Daily Comp. Pres. Doc. 1 (Feb. 4, 2021).

61. See Hathaway et al., *supra* note 23, at 700–04 (arguing that agreements ought to be made public by the State Department, for example, through the *Federal Register*).

for executive agreements needs repair and have recommended that Congress institute a requirement that executive agreements be published in the *Federal Register* by the State Department.⁶² These are not mutually exclusive—once USTR adds links for easy access from its annual report and website, those also can be shared with the State Department. There may be still other alternatives to achieve the same public-facing transparency, such as using a neutral third-party repository or independent commission or empowering the International Trade Commission, which also has a trade agreements program role.⁶³ But creating an additional layer of bureaucracy by going through another agency is not necessary. USTR has a reasonable start with its Annual Report that covers more agreements than the State Department’s collection. Now it needs to go beyond the list approach to provide the texts themselves.

The bigger difficulties with this arrangement are the fragmentation and disaggregation of trade lawmaking across the trade administrative state and modern trade lawmaking’s concomitant diverse forms. Such diversity poses a problem for any centralization when it comes to TEAs. The many agencies that are now engaged in diagonal rulemaking through the conclusion of TEAs with foreign counterparts sometimes do not consider what they are doing to rise to the level of “executive agreement” falling within the scope of any collection effort, whether at USTR or at the State Department. For example, USDA maintains its own collection of agricultural trade agreements that it has negotiated often in partnership with USTR called “work plans,” which govern the terms of the import and export of certain agricultural products.⁶⁴ These work plans are not available from USDA, despite its representations to the contrary in prior rulemakings,⁶⁵ and they do not make the cut in USTR’s Annual Report despite governing the import, export, and harmonization of agricultural products.⁶⁶ This question as to what constitutes a trade deal is one that requires further study by both branches and by scholars.

Another recommendation made by Hathaway, Bradley, and Goldsmith for executive agreement transparency is that Congress could withhold appropriations for implementation where agencies fail to pub-

62. See *id.*

63. See U.S. Int’l Trade Comm’n, Publ’n No. 5228, *The Year in Trade 2020: Operation of the Trade Agreements Program*, 72d Report (2021), <https://www.usitc.gov/publications/332/pub5228.pdf> [<https://perma.cc/5MSW-4VSS>].

64. See, e.g., E-mail from Professor Guillermo Garcia Sanchez, Assoc. Professor, Tex. A&M Univ. Sch. of L. to author (Nov. 2, 2021) (on file with the *Columbia Law Review*) (describing a request equivalent to a Freedom of Information Act request made to the Mexican government that produced a document listing the work plan).

65. USDA has said that they are available upon request. *Revision of Fruits and Vegetables Import Regulations*, 72 Fed. Reg. 39,482, 39,484 (July 18, 2007). When requested by this author’s team, however, USDA declined to provide them. See E-mail from Abbey Powell, Acting Chief of Staff, Plant Prot. & Quarantine, Animal and Plant Health Inspection Serv., USDA, to author (June 22, 2020) (on file with the *Columbia Law Review*).

66. Annual Report, *supra* note 1, at Annex II.

lish agreements.⁶⁷ While likely useful if adopted for other types of executive agreements, that recommendation is difficult to square with the TEA experience. The threat of withheld funds is of little use in trade for several reasons. First, such a requirement may lead executive agencies to carry out these negotiations in the shadows even more than they do now—either because agencies may seek to deploy general appropriations in service of TEAs without making that known or because agencies may try to make or change TEAs through alternative workstreams to avoid such scrutiny. TEAs could be negotiated, changing regulations and imposing rules, and then operationalized without broad awareness as to their source. At least now, TEAs are often announced even if they are not made available to the public and Congress. Moreover, that penalty could have another opposite effect from what Congress would intend: The executive may decline to engage in negotiations at all for fear of running afoul of congressional authority and endangering other workstreams of importance.

In the case of TEAs, many of which create market access opportunities for U.S. businesses, members of Congress often have an interest in such agreements moving forward. Accordingly, Congress is not incentivized to hold back funds even when it knows about the agreement. Further, whose funds would be withheld? The agencies making and maintaining these agreements are scattered across the executive branch, and it is often not clear which delegation matches which implementation. If USTR negotiates an agreement that Customs and Border Protection cannot implement, what then? That scenario could risk international and domestic litigation that runs contrary to both branches' goals. Finally, most agreements do not require funding, so withholding appropriations made for such negotiations would be difficult and nearly impossible to do as a matter separate from the rest of an agency's work, particularly in the case of USTR. A general reduction in funding for some of these agencies is unlikely to be in the United States' best interest. The executive agreement universe would appear not to be a one-size-fits-all environment. Trade law, as a specially situated area, requires a tailored solution.

Second, USTR may need more staff and more staff time to account for known missing agreements, as well as those that are yet to come. The limited capacity of the foreign commerce bureaucracy has undoubtedly contributed to the present state of play. As of now, the agencies involved can barely keep track of the agreements they have.⁶⁸ There is little incentive for them to add more work to their already taxed portfolios with an agreement scavenger hunt or detailed reporting. As noted, overwork and differently directed resources have inhibited the agency from taking the necessary steps to preserve and maintain records, especially for small agreements that are not in the public eye.⁶⁹ Congress could appropriate

67. See Hathaway et al., *supra* note 23, at 707.

68. See *supra* Part II.

69. See *supra* Part II.

additional funding specifically for this purpose, such as to enhance the USTR Chief Transparency Officer's staff. As of now, that officer has none, and the role has often been assigned to another political officer such as the General Counsel.⁷⁰

As for reporting to Congress, the TEA experience confirms the need to revise and update the Case Act. To be sure, the purpose of sharing agreements with Congress ought to be for Congress to review either for approval or implementation or for the opportunity to engage with the executive before the agreement enters into force. Nothing about the current system achieves either of these goals. Moreover, while the Case Act may be useful—even if outdated given the technology of today—for non-trade agreements regarding which Congress has little skin in the game, Congress's constitutional prerogative in trade law counsels in favor of a separate accounting and reporting system. Most TEAs entered into force after the Case Act and may not have been anticipated in scope or scale at that time.⁷¹ And given trade's special place in law and policy and its separate institutional framework, it is not obvious that TEAs ought to go through the same reporting processes as other executive agreements.

Congress has spoken to this insufficiency only meekly. The Bipartisan Trade Promotion Authority Act of 2002 added a restriction to the President's negotiating authority, prohibiting the branch from entering into certain TEAs when not preapproved by Congress.⁷² To date, however, members have not invoked this statutory provision to push back on the executive's extensive use of TEAs. In some instances, members have encouraged such negotiations.⁷³

Recently, some members of Congress have proposed reforms to the Case Act,⁷⁴ but the changes in legislation made public to date are inadequate to solve trade's transparency problems. For example, one proposal seeks to add a Chief International Agreements Officer to agencies engaged

70. See, e.g., Press Release, Off. of the U.S. Trade Representative, USTR Releases Agency Transparency Principles (May 7, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/ustr-releases-agency-transparency-principles> [<https://perma.cc/A2TF-KDDB>].

71. At that time, it would appear that fewer than seventy TEAs were in force (based on this author's calculation in view of this author's TEA database).

72. See 19 U.S.C. § 3805(a) (4) (2018).

73. See Isabelle Ico, Analysts Weigh Benefits, Drawbacks of 'Sectoral' Trade Deals, Inside U.S. Trade (Jan. 28, 2021), <https://insidetrade.com/daily-news/analysts-weigh-benefits-drawbacks-sectoral-trade-deals> (on file with the *Columbia Law Review*); Isabelle Ico, India's Trade Minister Hopes to Negotiate 'Fresh' Package With Biden, Inside U.S. Trade (Feb. 17, 2021), <https://insidetrade.com/daily-news/india-s-trade-minister-hopes-negotiate-fresh-package-biden> (on file with the *Columbia Law Review*); Margaret Spiegelman, Portman Calls for New Trade Deal With Ecuador, Stronger Regional Ties, Inside U.S. Trade (July 16, 2021), <https://insidetrade.com/daily-news/portman-calls-new-trade-deal-equador-stronger-regional-ties> (on file with the *Columbia Law Review*).

74. See, e.g., United States Innovation and Competition Act of 2021, S. 1260, 117th Cong. § 3310 (2021).

in cross-border negotiation,⁷⁵ but that just enables yet another person to argue with the State Department as to what qualifies for its process and what should be set apart.

Only now is a clear sense emerging of the full scope and reach of executive agreements and TEAs. The preliminary findings suggest that TEAs, in light of their separate processes and impact, merit bespoke consideration in other ways. Further intensifying these struggles is the fact that agencies treat TEAs as falling outside administrative law disciplines. Hathaway has explored the prospects for an Administrative Procedure Act approach to executive agreements generally.⁷⁶ If any agreements warrant such treatment, it is certainly TEAs, or at least those TEAs that are functionally equivalent to regulation.

Finally, TEAs would benefit from additional disciplines that do not exist for other agreements regarding exit from the agreements. At present, no general statutory scheme requires the executive to notify Congress when it intends to withdraw from or terminate an agreement. Congress has not reserved for legislative scrutiny and decisionmaking the conclusion of any trade-related deals, unlike its treatment of the creation of those deals. Scholars have explored the separation of powers problems of leaving treaties and congressional–executive agreements but often take for granted that executive agreements are left to the executive even at the exit stage.⁷⁷ That may be logically coherent, but, even if so, the executive lacks guidelines on how it ought to report to Congress and to publish public information about agreements going out of force. There is little evidence to suggest, however, that they ever go out of force.⁷⁸ The executive tends to “agree over” past agreements rather than dispense and redo. More recent agreements may make reference to prior agreements and declare them to be superseded, but little of that is tracked and publicized. Instead, the numbers would suggest that TEAs only grow in number over time.⁷⁹ Reform is needed to capture U.S. exit from TEAs and likely across most other executive agreements as well.

CONCLUSION

The first year of the Biden Administration—an Administration that has prized transparency and downplayed massive free trade agreements—presents a prime opportunity to address these deficiencies in the TEA transparency regime, particularly as Trade Promotion Authority legislation

75. *Id.* § 3310(a)(6).

76. See Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 *Yale L.J.* 140, 147–48 (2009).

77. See, e.g., Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 *Yale L.J. Forum* 432, 435 (2018). See generally Laurence R. Helfer, *Exiting Treaties*, 91 *Va. L. Rev.* 1579 (2005) (discussing state practice on treaty withdrawal).

78. See Claussen, *Mini-Deals*, *supra* note 16, at 30.

79. See *id.* at 30–31.

is reconsidered and reviewed.⁸⁰ Distinct from other executive agreements in subject, process, form, and significance, TEAs merit swift attention and simple reform to keep both Congress and the public informed. If the Administration does not do so, Congress is likely to make its own revisions that might constrain the executive branch in unhelpful ways with respect to these helpful agreements.

80. See Margaret Spiegelman, *Tai Wants TPA Overhauled With Bipartisan Support, Doesn't Commit to Timeline*, Inside U.S. Trade (May 13, 2021), <https://insidetrade.com/daily-news/tai-wants-tpa-overhauled-bipartisan-support-doesn-t-commit-timeline> (on file with the *Columbia Law Review*) (describing how Trade Promotion Authority legislation is under debate by the Biden Administration and members of Congress).